(2)

No. 87-1852

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOSE A. LOPEZ, JR.

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

ROYALL P. TERRY, JR.
ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

QUESTION PRESENTED FOR REVIEW

DO WARRANTLESS CANINE SNIFFS OCCASIONED BY OFFICERS LAWFULLY INSIDE PREMISES VIOLATE THE FOURTH AND FOURTEENTH AMENDMENTS? (Restated)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES(Cont.)

TABLE OF AUTHORITIES(Cont.)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JOSE A. LOPEZ, JR.
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

The respondent, the State of Florida, opposes issuance of a writ of certiorari to review the opinion of the First District Court of Appeal for the State of Florida entered in this action on February 19, 1988, rehearing denied March 28, 1988.

JURISDICTION

Petitioner incorrectly invokes the jurisdiction of this court, citing 28

U.S.C. §1254(1). This citation is inapposite and irrelevant but respondent concedes that this court could grant certiorari pursuant to the provisions of 28 U.S.C. §1257(3).

STATEMENT OF THE FACTS

On Monday, February 9, 1987 in Jacksonville, Florida, deputy sheriffs were involved in an undercover drug buying operation. They were ensconced in a Ramada Inn motel in Jacksonville. Arrangements had been made to purchase cocaine from one Miguel Munoz, a kilo or two at a time, in quick succession contingent upon payment for each delivery at the officers' motel room until eight kilos had changed hands. When Munoz delivered the first kilo of cocaine he was arrested and scribblings on a piece of paper taken from his trousers incidental to the arrest

revealed the phone number of the Scottish Inn motel in Orange Park, 17 miles away, in a neighboring county and a three-digit number which the officers correctly reasoned was a room number. Munoz had been tailed by Deputy Porter from the vicinity of the Scottish Inn in Orange Park to a point where he was seen entering the Ramada Inn where the undercover officers were waiting. After Munoz was arrested there with a kilo of cocaine in his jacket, Porter was advised concerning the newly discovered information, relative to the Scottish Inn in Orange Park.

Had Munoz not been arrested, the arrangement was for him to proceed back to his stash and obtain the next increment of cocaine, deliver it and collect the money from the buyers as he would have done respecting the first increment. Because Munoz was now out of

circulation the police became concerned that whomever was guarding the stash of cocaine in Orange Park would grow uneasy and probably flee after disposing of the remaining seven kilos by flushing them down the toilet in the motel room. Consequently, Porter was directed to proceed to the Scottish Inn in Orange Park and secure the premises before any of this could happen. He obtained the assistance of uniformed officers from the City of Orange Park and proceeded to the motel. Room 154, the room number written on the piece of paper found in the possession of Munoz, was found to have been rented to one Omar Simon. Porter and the uniformed officers knocked on the door of room 154 and Jose Lopez, alias Omar Simon, alias Victor Tittle, answered the door. The uniformed officers immediately patted Lopez down for their own protection and

to determine if he was armed. Petitioner was wearing a .38 caliber pistol in a holster which was strapped to his ankle. Lopez was arrested and Mirandized immediately, but all of that is irrelevant to the petition as there were no testimonial fruits of consequence. Petitioner possessed identification credentials and a badge indicating that he was a member of the City of Miami Police Department. Lopez said that his name was Victor Tittle and that he was a native of New York. His Miami police identification indicated that his name was Jose Lopez, Jr. and that he had emigrated to the United States from Cuba in 1980. Lopez denied any knowledge concerning the suitcase in the bathtub. There was no search of the premises at this time, but the officers discovered the suitcase during a protective sweep of the motel room to

determine if there were any other persons inside, armed or otherwise.

After the premises were secured, enter Luke, the sniffer dog and his handler. The suitcase was moved from the bathtub to the bedroom in order to facilitate the sniff. Officer Bobby Deel, Luke's human partner, placed the suspect's suitcase in a line with several empty suitcases that Luke had never worked with and Luke alerted on petitioner's suitcase. As might be expected, petitioner had already denied any knowledge as to the contents of the suitcase. Detective Porter left and returned a couple of hours later with a search warrant. At that time the suitcase was opened and the expected seven remaining kilos of cocaine were found inside. Although the application for the search warrant included references to Luke's olfactory expertise

the trial court found that this was surplusage and that there had actually been no need to bring Luke into the operation. In other words, the trial court found that first, the Orange Park officers acted correctly in securing the premises after they determined that the room was occupied and second, based upon what they had learned thus far concerning the entire operation involving Munoz and now Lopez, there was probable cause that room 154 of the Scottish Inn in Orange Park, Florida was the "stash pad" for the remaining seven kilos of cocaine. Put still another way, the officers could have obtained a search warrant for room 154 for cocaine, without Luke's participation.

SUMMARY OF ARGUMENT

Initial entry into the motel room by uniformed officers was a result of peti-

tioner's answering the door. The premises were lawfully secured based upon exigent circumstances in order to prevent destruction of evidence and/or escape of law-breakers. If the police officers had a right to be on the premises then they had a right to have with them their sniffer dog and other police equipment and aids.

Luke, the sniffer dog, smelled the air molecules around a locked suitcase in petitioner's custody but no search was made until after the arrival of the search warrant. There was probable cause to obtain a search warrant with or without Luke's participation. The trial court acted correctly in refusing to grant petitioner's motion to suppress the cocaine that was seized incidental to execution of the search warrant.

ARGUMENT

DO WARRANTLESS CANINE SNIFFS OCCASIONED BY OFFICERS LAWFULLY INSIDE PREMISES VIOLATE THE FOURTH AND FOURTEENTH AMENDMENTS? (Restated)

Respondent submits petitioner is wasting this court's time by creating what is really a bogus issue, a strawman, as it were, and then proceeding to argue the issue on its merits as if it had already been established that the issue was genuine. Respondent reiterates that Luke's role in this case is totally irrelevant in that there existed independent probable cause to support the issuance of a search warrant based upon what the officers knew even before they knocked on the door of room 154. The purpose of knocking on the door was to secure the premises and not to make a search. The officers might have put the search warrant proceedings in motion at any time but they were preoccupied with securing the premises. Once this was

accomplished they elected to have Luke do his thing before proceeding further. Perhaps this contributed slightly to the delay in obtaining the search warrant but because Luke's sniffing was not an essential component of the probable cause equation, no wrong of constitutional dimension occurred. However, respondent welcomes this opportunity to urge upon this court the proposition that whenever police officers are lawfully inside the premises, even private premises, they have the right to have with them their equipment whether it be in the form of flashlights, drug field testing units, sniffer devices, or sniffer dogs.

Respondent will concede at the outset that if the police officers unlawfully entered petitioner's motel room then the evidence seized was the product of an unlawful entry and suppressible under the law. On the other hand, if the police

acted lawfully in securing the premises until a search warrant could be obtained then the fruits of the search, pursuant to the search warrant were properly held to be admissible. It is respondent's position that not only did the concerned officers act properly in entering and securing the premises but if they did so lawfully then the presence of the sniffer dog, Luke, was also lawful. If the police officers had a legal right to be where they were at the critical point in time then Luke's smelling air around the suitcases was lawful because sniffing of the air by the dog is not a search. Further to this, the search warrant that was issued was also sustainable even if there had been no mention of Luke and his educated nose in the affidavit that supports the search warrant. There was adequate basis for the issuance of the search warrant based upon what the police officers already knew, without Luke's help.

The law of Florida permits even an unannounced intrusion into any building, including a private home, where those within are already aware of the presence of someone outside and are then engaged in activities which justify the officers in the belief that an escape or destruction of evidence is likely to be attempted. Benefield v. State, 160 So.2d 706, 710 (Fla. 1964). Such was the case here. Warrantless entries into private homes are permissible under extigent circumstances. Jones v. State, 447 So.2d 570 (Fla. 1983). See also Arango v. State, 411 So.2d 172 (Fla. 1982), cert. denied, 457 U.S. 1140, 73 L.Ed.2d 1360 (1982).

Once the officers had disarmed petitioner and ascertained that there were no other persons in the motel room they were at an important juncture. If they had then proceeded to search the premises, any fruits of the search would have been

unlawfully obtained and inadmissible into evidence. Vale v. Louisiana, 399 U.S. 30, 26 L.Ed.2d 409 (1970). But this they did not do and the dicta in Vale supports the proposition that under extigent circumstances premises may be secured by the concerned officers until a search warrant can be obtained. In Vale, the search was ruled unlawful because the court held that after the officers entered the house and had satisfied themselves that there was no one in the house they should not have proceeded to search the premises without a warrant. Again, that is not what happened here. The officers did not proceed to search but froze the premises, as it were, and sent one of their number out to procure a search warrant based upon what the officers knew at that particular point in time. It is uncontraverted that Detective C. L. Porter, who had done the original mobile surveillance of Munoz, was by this

time, cognizant as to all of the details of this matter as learned from Detective Boney relative to the aborted cocaine sale and the arrest of Munoz and his companions. Respondent will show that if the police officers had a legal right to be in room 154, under the circumstances, the air around petitioner's suitcase was not a protected area. It is in the contents of the suitcase that there is a reasonable expectation of privacy, not in the air surrounding it.

In United States v. Solis, 536 F.2d 880 (9th Cir. 1976), the court noted that there is a split in authority as to whether sniffing, per se, constitutes a search at all. But even if it is a search it may be one that is reasonable under the circumstances. In Solis, the dog's handler had a legal right to be where he was at the time the dog alerted to the presence of cocaine and that the sniffing, if it was a search,

was not a prohibited search. The court further noted that dogs, because of their keen olfactory senses, have long been used to assist police in search and rescue missions, as well as in guard duty. Detection of contraband is a similar and related task. As in Solis, the method used in the instant case was inoffensive. There was no embarrassment to, or search of the person. Id. at 882-883.

Petitioner quotes from Judge Reinhardt's emotional condemnation of the use of "large police dogs to come into our homes and do whatever large police dogs do" as expressed in his concurring opinion in United States v. DiCesare, 765 F.2d 890 (9th Cir. 1985). Although the record is silent as to Luke's pedigree he might well have been an amiable little beagle of the type used at many airports, especially in Europe, because of their small size and ability to enter narrow spaces. Even the

tracker dogs used in the antebellum south to ferret out runaway slaves were probably bloodhounds, known more for their mournful baying on a fresh trail than for their ferocity. Be that as it may, in the case sub judice, armed, uniformed police officers had already entered petitioner's motel room. Petitioner himself, it appears, was, at that time, an officer of the Miami Police Department, armed with an ankle holster and no doubt already familiar with the role of Alsatian shepherd dogs used for crowd control by his own department. By the time Luke arrived the premises had been secured and it is highly unlikely that Luke, the trained drug detection dog, inspired much terror in the heart of Jose Lopez, trained police officer and cocaine trafficker. Respondent submits that petitioner's quote from Judge Reinhardt's concurring opinion is, for our

purposes here, rhetoric, pointless and inane.

The Second Circuit held in United States v. Bronstein, 521 F.2d 459 (2nd Cir. 1979) that canine surveillance conducted in a public airline terminal is not a "search" within the protection of the Fourth Amendment. Certainly, in that case, the dog's handler had a legal right to be where he was at the time he commanded the dog to sniff the defendant's luggage. Likewise, in the case sub judice the dog's handler and his fellow officers had a legal right to be where they were for the purpose of securing the premises pending the issuance of a search warrant. In the instant case there was no additional intrusion by the dog and the contents were not exposed prior to the arrival of the search warrant. The Bronstein court noted:

> What a person knowingly exposes to the public, even in his own home or office, is not a sub-

> ject of Fourth Amendment protection. Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967); and, see, United States v. Johnston, supra, 497 F.2d at 398. (emphasis added)

In footnote 3 at page 462, the Bronstein court further noted that the use of certain "sense enhancing" instruments to aid in the detection of contraband does not constitute an impermissible Fourth Amendment search. The court cited a number of cases that involved the use of a boat searchlight, and binoculars. But see United States v. Goldstein, 635 F.2d 356 (5th Cir. 1981) holding that a dog sniff is not a search.

The movement of petitioner's suitcase from the bathroom to the living room where it was mixed with several other (empty) suitcases brought in by Officer Deel, in order to facilitate the sniffing, does not amount to a Fourth Amendment seizure and the action of Luke's nose was not a search

protected by the Fourth Amendment. "One's legitimate privacy interest in his personal luggage concerns its contents, not its exterior." State v. Goodley, 381 So.2d 1180, 1182 (Fla. 3rd DCA 1980), citing United States v. Chadwick, 433 1, 14, 97 S.Ct. 2476, 2485, 53 L.Ed.2d 538, 550, n.8 (1977). Movement of a suitcase from a baggage cart to the floor, to facilitate the sniff, is a de minimis intrusion certainly not amounting to a seizure. State v. Mosier, 392 So.2d 602 (Fla. 3rd DCA 1981). See also Mata v. State, 380 So.2d 1157 (Fla. 3rd DCA 1980); United States v. Fulero, 162 U.S.App.D.C. 206, 498 F.2d 748 (D.C. Cir. 1974).

Respondent is aware of this court's holdings in Arizona v. Hicks, 480 U.S. _____, 94 L.Ed.2d 347 (1987) but Hicks is easily distinguishable. In that case the police officer's movement of stereo equipment in order to obtain the serial numbers

during an unrelated warrantless search of an apartment was not accompanied by probable cause to believe the equipment was stolen. Therefore, respondent submits that the movement of the suitcase from the bathtub to the living room to facilitate Luke's inspection of same in a row with several empty suitcases is of no consequence here.

Respondent concedes that lawful entry for the purpose of securing the premises does not give the police license to search an entire building for evidence. United States v. Satterfield, 743 F.2d 827, 845 (11th Cir. 1984), cert. denied, 471 U.S. 1117, 86 L.Ed.2d 262 (1985). But the law is clear, however, that when officers reasonably believe that delay in checking the premises would endanger their lives or the lives of others they may conduct a security sweep. See e.g., United States v. Burgos, 720 F.2d 1520, 1526 (11th Cir. 1983). If officers spot evidence in plain

view during such a protective sweep, they may seize it. United States v. Standridge, 810 F.2d 1034, 1038 (11th Cir. 1987), cert. denied, _____ U.S. _____, 95 L.Ed.2d 877 (1987). See also United States v. Caraza, et al., 2 F.L.W.Fd. C466 (11th Cir. Case No. 86-5548, April 25, 1988).

Respondent urges that the information on which the search warrant was secured came from sources wholly unconnected with the entry and known to the officers well before the entry. In a case involving precisely this circumstance this Court held that, under such circumstances, the fruits of the search pursuant to the warrant were not derivative of illegality and not the "fruit of the poison tree." Segura, et al. v. United States, 468 U.S. 796, 82 L.Ed.2d 599 (1984). The Supreme Court of Florida followed Segura in deciding State v. Riley, 462 So.2d 800 (Fla. 1984) which turned on a similar point.

In the case sub judice, there was no search of anything until after the search warrant arrived. Petitioner apparently finds fault with the search warrant because the application included Luke's hit on the suitcase. Although respondent contends that such an objection would be meritless, even if it had merit, the officers acted in good faith based upon a facially valid warrant signed by a neutral and detached magistrate. This Court has held that when police officers act in objective good faith or their transgressions have been minor, inherently trustworthy tangible evidence obtained in reliance on such a warrant will not be suppressed. United States v. Leon, 468 U.S. 897, 82 L.Ed.2d 677 (1984). In State v. Bernie, 472 So.2d 1243 (Fla. 2d DCA 1985), a case involving a fatally defective warrant, the court applied the cost benefit approach of Leon:

> Exclusion of the cocaine would be improper because there is not police illegality and thus nothing to deter.

Id. at 1247.

Irrespective of Luke, all the officers needed was a valid search warrant for room 154. The suitcase need not have been listed as a place to be searched. The warrant limited the items to be seized to cocaine and that reference sufficiently limits the discretion of the executing officers. North v. State, 32 So.2d 915 (Fla. 1947); Carlton v. State, 449 So.2d 250 (Fla. 1984). A search warrant need not specify the precise location of the items to be seized within the premises. The designation of room 154 to be searched for cocaine substantially limits the area which the officers can search and the items for which the officers may search. Any suitcase, box or other container on the premises that could be used to conceal

cocaine could be searched pursuant to a warrant designating room 154 as the premises to be searched. Schrager v. State, 472 So.2d 896 (Fla. 4th DCA 1985).

CONCLUSION

The excellent police work that this case involved resulted in the seizure and forfeiture of eight kilograms of cocaine and the arrest of several cocaine traffickers from the Miami area. The evidence, as presented at the hearing, shows that the concerned officers followed a logical and lawful progression as to all the actions they took at any particular juncture. They took delivery of a kilo of cocaine from one Munoz, arrested him, searched him and recovered from his pocket the telephone number and the room number of a motel that was within approximately 15 minutes driving distance of the Ramada Inn in Jacksonville where the transaction took place. The sellers had advised the under-cover officers that the next increment of cocaine could be procured in approximately 30 minutes. The officers made a logical assumption that room 154 at the Scottish

Inn, Orange Park, Florida was the stash from which the first kilo of cocaine had come and that from which subsequent deliveries would be made. The circumstances under which the warrantless entry was made justified prompt entry and securing of the premises in accordance with standards already announced in numerous federal and state decisions dealing with this issue.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROYALL P. TERRY, JR.
ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT